Not to Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

MARGARET LeSTRANGE, Plaintiff, vs. FORTIS BENEFITS INSURANCE COMPANY, Defendant.	No. C02-4059-MWB **MEMORANDUM OPINION AND ORDER REGARDING TRIAL ON THE MERITS ON WRITTEN SUBMISSIONS**

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I. INTRODUCTION

A. Procedural Background

On July 15, 2002, plaintiff Margaret LeStrange ("LeStrange") filed this lawsuit pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, against defendant Fortis Benefits Insurance Company ("Fortis"). In the single count of the Complaint, LeStrange alleges that Fortis's denial of coverage for long term disability benefits ("LTD") for LeStrange is a breach of Fortis's long term disability insurance benefits policy which is held by LeStrange's employer, Pure Fishing, and which is governed by ERISA. Def.'s App., at 0201A. LeStrange, therefore, seeks to recover the benefits that Fortis has denied and to enjoin Fortis to pay such benefits pursuant to section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B).

Prior to filing her complaint, LeStrange sought and was approved by Fortis to receive LTD benefits. The benefit commencement date was May 23, 2001, and LeStrange was to receive her first disability check from Fortis on or around June 22, 2001. Def.'s App., at 0185. However, on May 18, 2001, before LeStrange's benefit commencement date, Fortis sent LeStrange a letter revoking its prior approval and denying her benefits on account of her employer's ability to provide accommodations that would allow LeStrange to perform the material duties of her job, thereby rendering her ineligible for disability benefits. Despite Fortis's finding, it stated in the May 18, 2001, letter that in order "To give you

[LeStrange] an opportunity to work out the accommodation details with your employer and transition back to work, we agree to issue a courtesy check under separate cover for the period 5/23/2001 through 6/22/2001." Def.'s App., at 0197. Consequently, on June 1, 2001, by and through her attorney, Joseph Fitzgibbons, LeStrange appealed Fortis's decision to deny benefits, which was referred to the Fortis Benefits Disability Claims Appeals Committee on June 7, 2001. Def.'s App., at 0178. On November 12, 2001, the Fortis Appeals Committee upheld the denial of LeStrange's claim for disability benefits. Subsequently, on December 6, 2001, LeStrange appealed Fortis's denial of benefits for a second time, which was referred on December 11, 2001, for appellate review. On March 22, 2002, Dave Orjala, a Fortis Disability Appeals Specialist, sent a letter to LeStrange notifying her that under the second review portion of the appeals process, Fortis had decided to uphold the denial of her long-term disability claim. Fortis concluded that LeStrange did not satisfy the Occupation Test set forth in the policy provisions, and thereby was not disabled within the meaning of the policy. On December 18, 2002, the parties jointly requested adjudication of this matter on written submissions. Pursuant to a scheduling order, defendant Fortis filed the record to be considered by the court on January 21, 2003; LeStrange filed her trial brief on April 3, 2003; Fortis filed a responsive trial brief on April 10, 2003; and LeStrange filed her reply brief on May 9, 2003. The plaintiff LeStrange is represented by Joseph Fitzgibbons and Kevin Sander of Fitzgibbons Law Firm, in Estherville, Iowa. Fortis is represented by Michael Thrall of Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C., in Des Moines, Iowa. This matter is now fully submitted for determination on the merits.

B. Initial Findings Of Fact

The court will present here its findings of undisputed facts and its resolution of some of the factual disputes between the parties, so that its legal analysis to follow will be put

in the proper context. However, the court will reserve certain critical findings of fact for the pertinent place in its legal analysis, where their significance will be most apparent.

1. LeStrange's condition

In July of 1993, LeStrange underwent a "right below the knee" amputation and was fitted with an artificial limb/prosthesis at the Mayo Clinic in Rochester, Minnesota. Since that time, Dr. Jeffrey M. Thompson, M.D. ("Dr. Thompson"), has been LeStrange's treating physician and responsible for her care with the amputee clinic in the Department of Physical Medicine and Rehabilitation at the Mayo Clinic. LeStrange began working for Pure Fishing, then Outdoor Technologies Group, in 1993, after she underwent her right below the knee amputation in July of 1993. During the time LeStrange worked for Pure Fishing, she wore a prosthesis on her right leg that enabled her to stand while she tended her machine. Leading up to February 22, 2001, LeStrange worked as a Nylon Spooler in Pure Fishing's factory. However, on February 23, 2001, LeStrange notified Pure Fishing that she could no longer continue to work due to complications at the site of her amputation. Def.'s App., at 0254-55. Specifically, LeStrange stated in her long term disability claim statement to Fortis, on approximately March 29, 2001, that she was "Unable to wear my prosthetic for long periods of time due to psoraisis [sic]." Def.'s App., at 0254. In addition to psoriasis on the claim statement, LeStrange also listed a skin rash and below the knee amputation to describe the nature and symptoms of her illness. Def.'s App., at 0254. When asked in the claim statement what accommodations she felt could be made by her employer to allow her to return to work, Lestrange stated, "None if unable to wear my prosthetic because of psorasis [sic]." Def.'s App., at 0255. Furthermore, based on phone conversations between Danielle Nelson, Fortis Disability Claims Analyst, and LeStrange, it appears LeStrange did not believe that she could continue to perform her job because in the absence of her prosthetic, she could no longer stand and do her work. During this same conversation,

LeStrange also informed Danielle Nelson that she was diagnosed with psoriasis at age two.[1]

Shortly after LeStrange did not return to work on February 23, 2001, she underwent a series of doctor's visits at the Mayo Clinic in Rochester, Minnesota. Beginning on March 12, 2001, LeStrange met with Dr. Lisa Drage, M.D. (Dr. Drage), doctor of dermatology. According to Dr. Drage's notes, LeStrange was "referred by her physician in her home area for evaluation of a new rash." Def.'s App., at 0117. Dr. Drage noted that LeStrange had a history of psoriasis which mainly affected her scalp, elbows, knees, and back. However, Dr. Drage pointed out in her notes with regard to LeStrange's present complaint, that she "presents today for another problem." Def.'s App., at 0117. Dr. Drage commented that LeStrange's chief complaint was that of a new rash which appeared in December and has affected her "right lower extremity amputation stump as well as her chest, shoulders, neck, back, arms, and hands." Dr. Drage also remarked that the rash was very pruritic and did not respond to the use of topical steroids.[2] According to Dr. Drage's notes, LeStrange attributed the rash to a new product—spider braid line—that her company introduced and which LeStrange had to spool. Despite LeStrange's beliefs regarding the cause of her rash, she herself reported to Dr. Drage that she stopped "all line work with this product since the beginning of January, and it has not really improved." Thus, Dr. Drage commented in her note's section entitled "impression/report/plan," that "Although Ms. Lestrange [sic] attributes her reaction to her workplace, there are a significant amount of other possibilities

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[1]The court has referred to a standard medical dictionary for the definition "psoriasis" which is "A common multifactorial inherited condition characterized by the eruption of circumscribed, discrete and confluent, reddish, silvery-scaled maculopapules; the lesions occur predominantly on the elbows, knees, scalp, and trunk." STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000).

[2]According to STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000), the definition of "pruritic," relating to "pruritus" means "itching."

to consider." Def.'s App., at 0118. Dr. Drage asked LeStrange to bring in the material data and safety sheets from her workplace on her follow-up visit.

Later that same day, LeStrange met with her treating physician Dr. Thompson. Dr. Thompson stated that LeStrange complained of a rash, which he observed on her residual limb and upper extremities—mostly on her hands. Dr. Thompson noted that "She [LeStrange] reported new materials at work, but the symptoms had started before this." Def.'s App., at 0121. Upon examination, Dr. Thompson concluded that despite her history of psoriasis, "this new rash has a different manifestation." Def.'s App., at 0121. Dr. Thompson duly noted that LeStrange "has had problems with skin sensitivity in the past." Def.'s App., at 0121. Dr. Thompson mentioned that the rash could be the result of a latex allergy and provided LeStrange with a work release for taking time off in the upcoming weeks until he was able to examine her again in four to five weeks. Def.'s App., at 0122.

On April 9, 2001, LeStrange paid Dr. Drage a second visit. Dr. Drage observed that LeStrange "has improved significantly. . . . has significant improvement of the amputation stump" with only "mild postinflammatory hyperpigmentation and erythema of the stump but no outright dermatitis currently." Def.'s App., at 0114.[3] Dr. Drage reported to LeStrange that the bacterial culture taken at her last examination showed Staph aureus and betahemolytic Strep.[4] It was during this visit that LeStrange provided Dr. Drage with the

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[3]The court refers to STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000), for the following definitions: "hyperpigmentation" is "An excess of pigment in a tissue or part"; "erythema" is "Redness due to capillary dilation." According to the *World Allergy Organization*, *http://www.worldallergy.org/index.html*,"dermatitis", also referred to as contact dermatitis, "is an inflammation of the skin characterized by redness, itching, blistering and, in chronic cases, flaking of scales of skin, resulting from exposure of the skin to substances in the environment. The site and shape of the affected areas of skin are directly related to the area that has been exposed to the causative substance.

[4]Staph aureus, or Staphylococus aureus, is a common species of bacterial infection (continued…)

material data and safety sheets from Pure Fishing. LeStrange proceeded to see Dr. Drage for a follow-up visit on April 11, 2001, at which time Dr. Drage informed LeStrange that "we did not find evidence of a contact dermatitis associated with her work or with the components of her prosthesis." Def.'s App., at 0113. The patch test results that Dr. Drage had taken at the March 12, 2001, examination came back positive for paraphenylenediamine, but were completely negative for all three different fish lines.[5] Dr. Drage attributed the positive paraphenylenediamine results to possible contact by LeStrange with her leather car seats, photocopying, and her shrink stocking in her prosthetic, all of which use paraphenylenediamine-containing materials. Despite these possibilities, Dr. Drage thought the positive test results were more likely attributable to a "combination of heat, infection, and irritation on the stump itself" causing a rash that spread to other areas of the body. Def.'s App., at 0113.

On April 11, 2001, LeStrange attended a follow-up visit at the Amputee Clinic at the Mayo Clinic with Drs. Thompson, Pingree; Mike Gazola, local prosthetist, and a physical therapy student. LeStrange informed the group that she "noticed improvement in the skin on her distal residual limb, and as of Sunday April 8, she started to wear her prosthesis again." Def.'s App., at 0119. However, the group observed that between April 8th—when she

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[4](…continued)
"found especially on nasal mucous membrane and skin (hair follicles)"; betahemolytic Strep, also a bacterial infection, is "a leading cause of meningitis." STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000).

[5] According to the *World Allergy Organization*, *http://www.worldallergy.org/index.html*, "paraphenylenediamine" is "a black dye used in permanent oxidative hair dyes and is used with cross-linkers to produce all hair dye colors. It is a major cause of allergic CD in hairdressers. Paraphenylenediamine is also used as an antioxidant in oils and greases, as a component in color film developers and as a dye for leather and rubber. It is an important cause of occupational dermatitis in a wide variety of trades."

started to wear her prosthesis again—and her appointment, an area of redness with some scaling had developed on her stump. Def.'s App., at 0119. In spite of the redness, LeStrange reported no pain or difficulty walking. LeStrange's possible return to work was discussed and it was noted "that it would be impossible for her to work without her leg and/or needing to remove her leg on a regular basis." Def.'s App., at 0119. It appears that the group of doctors and therapists present suspected that LeStrange's prosthetic liners may have been the cause of the rash, but mentioned that "other types of liners have been tried including Iceross and focal areas of silicone patches, all of which led to skin or rash breakout." Def.'s App., at 0119. Regardless, the group instructed LeStrange to line her prosthetic per their new recommendations. Finally, the group's notes reveal "A form was completed regarding her work restrictions." Def.'s App., at 0120. The form—an Attending Physician's Initial Statement of Disability ("APS")—was completed by Dr. Thompson and submitted to Fortis. In it, Dr. Thompson assigns LeStrange a Class 4, Moderate Limitation described as "capable of sedentary, clerical or administrative work—occasional 10# force, mostly sitting." Def.'s App., at 0249.

LeStrange did not return to work after February 22, 2001, for reasons the court will discuss at length in its legal analysis. The record shows that on October 31, 2001, Pure Fishing's Director of Human Resources, Jim Alger, notified LeStrange that company guidelines did not permit him to hold open her job after one full year of absence. Therefore, if she did not return to work by February 22, 2002, Pure Fishing would terminate her employment and discontinue her health benefits after March 2002.

2. Policy provisions

On November 12, 2001, Fortis sent LeStrange's attorney a letter as notification of its decision to deny LeStrange's long term disability claim. Def.'s App., at 0069. According to the letter, Fortis found that LeStrange did not satisfy the Occupation Test under its policy provisions and thus, was not disabled. Def.'s App., at 0069. Although it is by no means

the only provision of the Long Term Disability Insurance policy that the court will have to explore in this decision, for now it suffices to say that the provision of the Long Term Disability Insurance policy providing benefits for disabled persons states as follows:

> *Disability* or *disabled* means that in a particular month, you satisfy either the Occupation Test or the Earnings Test, as described below. You may satisfy both the Occupation Test and Earnings Test, but you need only satisfy one Test to be considered *disabled.*
>
> **Occupation Test:**
>
> - during the first 36 months of a *period of disability* (including the *qualifying period*), an *injury*, or sickness, or pregnancy requires that you be under the *regular care and attendance* of a *doctor*, and prevents you from performing at least one of the *material duties* of your regular occupation; and
> - after 36 months of *disability*, an *injury*, sickness, or pregnancy prevents you from performing at least one of the *material duties* of each *gainful occupation* for which your education, training, and experience qualifies you.

Def.'s App., at 0206. The critical question in this case is whether LeStrange is entitled to long term disability benefits under these policy provisions. However, resolution of that question involves an extensive discussion to follow in the court's legal analysis.

3. Fortis' initiation and termination of long term disability benefits

a. Initial approval

The court finds it important to note prior to beginning its consideration of the evidence in this case that Fortis's initial determination that LeStrange was disabled was based on LeStrange's supervisor's completion of Part II of the employer claim statement concerning the physical/non physical aspects of the claimant's job. In Part II of the employer claim statement, LeStrange's supervisor, Rick Kroese, indicated that LeStrange's job involved standing for four hours a day. This information coupled with Dr. Thompson's opinion in his APS that LeStrange was limited to performing a sit-down job caused Fortis to approve LeStrange's claiim by letter dated May 3, 2001, but also prompted Danielle Nelson, disability claims analyst for Fortis, to contact LeStrange on May 2, 2001, and inform her that despite approval of her claim, it would be referred to a vocational rehabilitation expert to analyze the possibility of her return to work and work accommodations. Def.'s App., at 0247.

In the initial approval letter, Danielle Nelson outlined a brief summary of LeStrange's claim, including a disability onset date of February 23, 2001, a benefit commencement date of May 23, 2001, and a benefit amount established at $1,036 per month with the first check to arrive on or around June 22, 2001. Def.'s App., at 0239. Despite her letter of May 3, 2001, approving benefits for LeStrange, Danielle Nelson recommended in her file summary that LeStrange's claim be referred to a Return to Work Team (RTW) to investigate the possibility of LeStrange returning to work for Pure Fishing based on Dr. Thompson's APS in which Dr. Thompson stated that LeStrange was capable of a "Sit down job, able to do with one leg." Def.'s App., at 0249. In addition, Danielle Nelson placed a call to Carla Jones, Benefits Manager at Pure Fishing, to confirm whether Pure Fishing was holding a position for LeStrange. According to Danielle Nelson, Carla Jones reported that Pure Fishing was holding LeStrange's position and in fact had "some sitting positions [available]

but she does not think the clmt [claimant—LeStrange] wants to be in a wheelchair." Def.'s App., at 0246. Danielle Nelson told Carla Jones that Cheryl Zilka, a vocational rehabilitation specialist with Fortis, would be contacting her to discuss accommodations for LeStrange to facilitate her return to work. Thus, in Danielle Nelson's file summary, she recommended that LeStrange's claim be given to Cheryl Zilka ("Zilka"). Def.'s App., at 0249.

b. Termination of benefits

As mentioned above, Fortis initially approved LeStrange's request for long term disability benefits on May 3, 2001. However, Fortis's inquiry regarding LeStrange's request did not end there, and LeStrange's claim file was referred to Zilka. On May 15, 2001, Zilka spoke with LeStrange's supervisor, Rich Kroese, about the possibility of LeStrange returning to work. Zilka recorded in her CP Activity Notes that Rich Kroese "Stated they were willing to accommodate and that he thought the job could be done from a wheelchair or a scooter. . . . Supervisor stated there was also a possibility that there were other positions available in the bait factory." Def.'s App., at 0233. On the following day, Zilka spoke with LeStrange regarding her conversation the previous day with Rich Kroese. Zilka presented to LeStrange the possibility of performing her job from a seated position. LeStrange responded by explaining that she had been in contact with Pure Fishing and informed her employer that she was not willing to use a wheelchair. Def.'s App., at 0232. One of the key issues in this case is whether LeStrange could perform the material duties of her occupation with accommodation. Without getting embroiled in that question until it comes up in the court's legal analysis, suffice it to say that LeStrange told Zilka that "she could not emotionally handle being seen without her prosthesis." Def.'s App., at 0232. Zilka informed LeStrange that her file would be referred to rehabilitation. On May 18, 2001, Anne Anthonie, Fortis Rehabilitation Specialist, reviewed LeStrange's file and determined that she was capable of a "sit down job" based upon Dr. Thompson's conclusions in his

APS. Def.'s App., at 0231. On account of Pure Fishing's willingness to accommodate LeStrange, as expressed by both Carol Jones and Rich Kroese, Anne Anthonie recommended that Fortis deny LeStrange's claim on the basis that she was no longer disabled because her employer could accommodate her.

On May 18, 2001, Fortis sent LeStrange a letter informing her that her claim for benefits had been denied. Def.'s App., at 0196. Anne Anthonie explained in the letter that at the time Fortis initially approved LeStrange's request, it had not spoken with Pure Fishing about whether Pure Fishing could accommodate her position. According to Anne Anthonie, after Pure Fishing agreed to accommodate LeStrange's position, LeStrange no longer satisfied the Occupation Test of Disability as set forth in the policy. However, Fortis proceeded to issue a courtesy check to LeStrange for the period between May 23, 2001, and June 6, 2001, to help facilitate her transition into the accommodated position. Def.'s App., at 0197.

c. LeStrange's first administrative appeal

After Fortis denied LeStrange's claim for benefits, LeStrange retained legal counsel. Consequently, LeStrange appealed Fortis's decision to deny benefits through her attorney on June 1, 2001, which was referred to the Fortis Benefits Disability Claims Appeals Committee on June 7, 2001. Pl.'s App., at Def.'s App., at 0178. Specifically, Dave Elvidge, Appeals Specialist at Fortis, reviewed LeStrange's file and subsequently requested clarification from LeStrange's attorney regarding support for her appeal. On June 27, 2001, in response to Fortis's request, LeStrange's attorney sent a letter to Fortis and enclosed a letter from Dr. Thompson. In his letter of June 12, 2001, Dr. Thompson stated "To suggest that a reasonable accommodation for a job would include discontinuing use of a leg and mandating the use of a wheelchair goes against the rehabilitation process and expands their impairment back to a disabling and handicapping condition." This evidence relates to the question of whether LeStrange could perform the material duties of her occupation with

accommodation. Again, without exploring that question until it comes up in the court's legal analysis, suffice it to say that Dr. Thompson's letter of June 12, 2001, signaled a change in his view regarding LeStrange's condition from his prior examination of her as detailed in the APS that he filled out on April 11, 2001. Similarly, on August 22, 2001, in response to additional requests by Fortis for support regarding LeStrange's appeal, LeStrange resubmitted Dr. Thompson's June 12, 2001, letter to Fortis and enclosed a letter from Dr. Ann Souder, an Outpatient Therapist. In Ms. Souder's August 15, 2001, letter she stated at some length that work in a wheelchair for LeStrange would be an unreasonable accommodation in terms of her mental and emotional health. Def.'s App., at 0148.

After receipt of the letters from Dr. Thompson and Ann Souder, Dave Elvidge referred LeStrange's file for vocational review for "clarification of job duties, occupational title and duties. Specifically does the occupation require standing, exposure to heat, weight bearing?" Def.'s App., at 0131. On September 6, 2001, Amy Langler, Vocational Rehabilitation Counselor, reviewed LeStrange's file alongside photographs of her work site at Pure Fishing and a job description dated October 4, 2000, for her position of semi-automatic nylon spooler as provided by her employer. There appears to be no dispute—and the court therefore finds—that LeStrange's occupation is that of a Fishing-Line-Winding-Machine-Operator as defined by the Dictionary of Occupational Titles ("D.O.T."), code designation 689.685-066. Based on the photographs and the D.O.T. occupational description, Amy Langler concluded that LeStrange's job could be performed from either a seated or standing position.

Likewise, LeStrange's appeal was forwarded for physician review by Dr. Gregory J. Frey, M.D., a general internist at a North Memorial Hospital owned clinic, after Fortis received the letters and medical records from Dr. Thompson and Ann Souder. Dr. Frey relied upon Dr. Thompson's statement dated April 11, 2001, quoting him as stating, "'the claimant would require the ability to work without use of her prosthesis intermittently for

variable amounts of time up to weeks.'" Dr. Frey also commented that Dr. Thompson mentioned in that same examination that if LeStrange was permitted to perform her duties from a seated position, that such a modification would enable her to perform her job. Dr. Frey reviewed this information in conjunction with the patch test results conducted by Dr. Drage. Dr. Frey deferred to Dr. Drage's conclusions that LeStrange's subacute dermatitis that she presented with in December of 2000, were not due to any work site component materials or components of her prosthesis. Instead, Dr. Drage believed the periodic dermatitis was the result of a combination of heat, occasional skin infection, and mechanical irritation from the prosthesis. During these times when LeStrange's stump is irritated, Dr. Frey reasoned that LeStrange "should be able to sit in either a wheelchair or on a stool without wearing her right below the knee prosthesis." Def.'s App., at 0093. Finally, Dr. Frey concluded that "physical limitations beyond inability to stand/walk without the prosthesis are not present. Ms. LeStrange would be capable of performing her occupation if allowed to sit in either a wheelchair or on a stool." Def.'s App., at 0093.

In addition, Dr. Ellen Snoxell, a psychologist with the Behavioral Health Services' office of Fortis, reviewed LeStrange's file focusing her inquiry on Dr. Souder's diagnosis of LeStrange with adjustment disorder. During LeStrange's sessions with Dr. Souder, Dr. Snoxell notes that LeStrange reported she believed her symptoms were the result of the possibility of having to return to work in a wheelchair without her prosthetic. Dr. Snoxell points out that based on Dr. Souder's three sessions with LeStrange, Dr. Souder concluded that "'She appears to really have no mental health issues other than the anxiety and the stress regarding the possibility of having to go to work in a wheelchair.'" Def.'s App., at 0078. Based on this evidence, Dr. Snoxell determined that the diagnosis of adjustment disorder was inappropriate because the only reported stressor was LeStrange's proposed return to work, an event that had not yet occurred and therefore did not fall within the definition of adjustment disorder. According to Dr. Snoxell, the diagnostic criteria for the diagnosis of

adjustment disorder includes "'A) the development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring *within 3 months of the onset of the stressor(s).*'" Def.'s App., at 0078 (emphasis added). Therefore, Dr. Snoxell concluded that "At the present time, Ms. LeStrange does not meet the criteria for any mental health diagnosis. It is unknowable whether or not she will meet criteria at some future date." Def.'s App., at 0079.

Following this extensive review by Fortis, on November 12, 2001, Dave Elvidge recommended, after reexamining LeStrange's file including the physician review, upholding the denial of LeStrange's claim for LTD benefits. The letter conveying Fortis's determination on appeal included the following language concerning the definition of the Occupation Test:

> It is important to note that when assessing disability, we consider only the duties that are material to the occupation, not all of the specific duties of a particular job with a particular employer. Thus, we are evaluating an individual's ability to perform the occupation duties as they are typically performed in the labor market.

Def.'s App., at 0070. Dave Elvidge proceeded to note, as the definition related to LeStrange, "that we do not consider standing, walking or being exposed to heat or humid conditions to be material duties of the occupation of Fishing-Line-Winding-Machine-Operator." Def.'s App., at 0070.

d. LeStrange's second administrative appeal

Following denial of her first administrative appeal, on December 6, 2001, LeStrange proceeded to appeal Fortis's denial for a second time. In her second appeal, LeStrange asserted that she met the Occupation Test for disability as set forth in the policy issued by Fortis because the accommodation of sitting "is not sufficient where such action would impede, and even set back, Ms. LeStrange's rehabilitation," hence, LeStrange was unable to work full-time which the parties stipulate is a material duty of her job. Def.'s App., at

0057. The second appeal was considered by Dave Orjala, appeals specialist for Fortis, to whom LeStrange addressed a letter dated January 25, 2002, accusing Fortis of bad faith and asserting that she could not perform the material duties of her position because her job required her to be up and down during the entire shift, as well as pushing and pulling materials on a dolly or conveyance. Def.'s App., at 0031. In addition, with the letter, LeStrange enclosed a notice from the Social Security Administration setting out the amount of her award for disability benefits, an article regarding psoriasis, and a letter form Jim Alger, Director of Human Resources at Pure Fishing, revealing its willingness to accommodate LeStrange in her job or otherwise terminate her employment. Dave Orjala proceeded to forward her file once again to Amy Langler, vocational rehabilitation counselor, for review. Amy Langler contacted Carla Jones, Human Resources Representative at Pure Fishing, regarding the alleged impediments to LeStrange's ability to perform her job from a seated position as asserted by LeStrange in her letter of January 25, 2002. According to Amy Langler, Carla Jones "stated that a bin of materials could be moved beside the claimant's workstation so that they would be readily available to her." Def.'s App., at 0029. Similarly, Amy Langler addressed the height of LeStrange's work station with Carla Jones, who informed Amy Langler that it could be lowered to accommodate a wheelchair. Dave Orjala reviewed LeStrange's file one last time, with the benefit of Amy Langler's review and the additional materials provided by LeStrange in her January 25, 2002, letter and determined that "Given the information available, we are unable to overturn the denial." Def.'s App., at 0028. According to Dave Orjala's letter, the medical and vocational information made available to Fortis indicated that LeStrange was capable of performing her occupation, as well as her specific job with reasonable accommodation. Def.'s App., at 0028.

With this factual background, the court turns to its legal analysis of the issues presented.

II. LEGAL ANALYSIS AND FURTHER FINDINGS OF FACT

A. Standard Of Review

Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), provides that "a participant or beneficiary" may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Thus, "'ERISA provides a plan beneficiary with the right to judicial review of a benefits determination.'" *Norris v. Citibank, N.A., Disability Plan*, 308 F.3d 880, 883 (8th Cir. 2002) (quoting *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160 (8th Cir. 1998), and citing 29 U.S.C. § 1132(a)(1)(B)); *Jackson v. Metropolitan Life Ins. Co.*, 303 F.3d 884, 887 (8th Cir. 2002) (citing *Donaho v. FMC Corp.*, 74 F.3d 894, 898 (8th Cir. 1996)); *Shelton v. ContiGroup Cos., Inc.*, 285 F.3d 640, 642 (8th Cir. 2002) (also quoting *Woo*); *Delta Family-Care Disability & Survivorship Plan v. Marshall*, 258 F.3d 834, 840 (8th Cir. 2001), *cert. denied*, 532 U.S. 1162 (2002).

1. "Deferential" review of factual determinations

Although beneficiaries are entitled under ERISA to judicial review of an administrator's denial of benefits, where the plan gives the administrator discretionary authority to determine eligibility for benefits, courts ordinarily review the administrator's decision only for an "abuse of discretion." *See id.* (again citing *Woo*); *Shelton*, 285 F.3d at 642 (also citing *Woo*); *Clapp v. Citibank, N.A., Disability Plan (501)*, 262 F.3d 820, 826 (8th Cir. 2001); *Marshall*, 258 F.3d at 840.[6] "'This deferential standard reflects [the courts'] general hesitancy to interfere with the administration of a benefits plan.'" *Id.* (quoting *Layes*

[6]Although a district court ordinarily reviews an administrator's decision only for abuse of discretion, an appellate court "reviews a district court's application of the abuse of discretion standard *de novo.*" *Jackson*, 303 F.3d at 887; *Clapp*, 262 F.3d at 828; *Marshall*, 258 F.3d at 841

v. Mead Corp., 132 F.3d at 1246, 1250 (8th Cir. 1998)). The parties here do not dispute that the Group Long Term Disability Insurance Policy gives Fortis the discretion to interpret the plan language, so that this "deferential" standard of review appears to be applicable.[7]

As this court recently explained,

> Under the deferential abuse-of-discretion standard applicable to judicial review of the eligibility determination at issue here, "a reviewing court should consider only the evidence before the plan administrator when the claim was denied." *Shelton*, [285] F.3d at [642]. The court must "look to see whether [the administrator's] decision was reasonable." *Clapp*, 262 F.3d at 828; *Marshall*, 258 F.3d at 841. As the Eighth Circuit Court of Appeals has explained,
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> > In doing so, [the court] must determine whether the decision is supported by substantial evidence, "which is more than a scintilla, but less than a preponderance." *Sahulka v. Lucent Techs, Inc.*, 206 F.3d 763, 767-68 (8th Cir. 2000) (internal quotes omitted). [The administrator's] decision "will be deemed reasonable if a reasonable person could have reached a similar decision, given the evidence before him, not that a reasonable person would have reached that decision." *Cash [v. Wal-Mart Group Health Plan]*, 107 F.3d [637,] 641 [(8th Cir. 1997)] (internal quotes omitted). [The court] will not disturb a decision supported by a reasonable explanation "even though a different reasonable interpretation could have been made." *Id.* [The court must] consider "[b]oth the quantity and quality of the evidence." *Fletcher-Merrit v. NorAm Energy Corp.*, 250 F.3d 1174, 1179 (8th Cir. 2001).
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> *Clapp*, 262 F.3d at 828; *accord Marshall*, 258 F.3d at 841. "Put another way, the [administrator's] decision need not be the only sensible interpretation, so long as its decision offer[s] a

[7]The policy states, "We have the sole discretionary authority to determine eligibility for participation or benefits and to interpret the terms of the Policy. All determinations and interpretations made by us are conclusive and binding on all parties." Def.'s App., at 0225

> reasoned explanation, based on the evidence, for a particular outcome." *Marshall*, 258 F.3d at 841 (citing *Donaho v. FMC Corp.*, 74 F.3d 894, 899 (8th Cir. 1996)).

Brant v. Principal Life & Disability Ins. Co., 195 F. Supp. 2d 1100, 1108-09 (N.D. Iowa 2002), *aff'd*, 50 Fed. Appx. 330, 2002 WL 31477623 (8th Cir. Nov. 7, 2002) (unpublished op.); *West v. Aetna Life Ins. Co.*, 171 F. Supp. 2d 856, 866-67 (N.D. Iowa 2001). In short, "[a] plan administrator's fact-based disability decision is reasonable if it is supported by 'substantial evidence.'" *Norris*, 308 F.3d at 883-84 (citing *Fletcher-Merrit v. NorAm Energy Corp.*, 250 F.3d 1174, 1179 (8th Cir. 2001)); *Jackson*, 303 F.3d at 887.

2. Review of interpretations of plan terms

When the question is whether the administrator has properly interpreted the terms of the plan, and not a question of the administrator's overarching decision with regard to eligibility for benefits, a different test of reasonableness applies:

> Whether or not an administrator has properly *interpreted the terms of the plan* is subject to a different test of reasonableness. *See Brant*, 195 F. Supp. 2d at 1109 n.1; *West*, 171 F. Supp. 2d at 866 & 867-70 (discussing the frequent "blurring" by parties and courts of the distinctions between the administrator's determination of facts and interpretation of plan terms and the standard of review applicable to each). The test of the "reasonableness" of the administrator's interpretation of the terms of the plan requires the court to consider the following five factors: (1) whether the administrator's interpretation is consistent with the goals of the Plan; (2) whether the interpretation renders any language in the Plan meaningless or internally inconsistent; (3) whether the administrator's interpretation conflicts with the substantive procedural requirements of the ERISA statute; (4) whether the administrator has interpreted the relevant terms consistently; and (5) whether the interpretation is contrary to the clear language of the Plan. *Brant*, 195 F. Supp. 2d at 1109 n.1 (citing *Shelton*, 285 F.3d at 642); *West*, 171 F. Supp. 2d at 866 (citing *Farley v. Arkansas Blue Cross & Blue Shield*, 147 F.3d 774, 777 n.6 (8th

> Cir. 1998), and *Finley v. Special Agents Mut. Ben. Ass'n, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992)); *and compare Shelton*, 285 F.3d at 642 (describing these factors as applicable "[i]n determining whether the administrator's *decision* constituted an abuse of discretion," but then applying them to the administrator's *interpretation* of plan terms) (emphasis added), *with Ferrari v. Teachers Ins. & Annuity Ass'n*, 278 F.3d 801, 808 (8th Cir. 2002) (describing these factors as applicable "in determining whether a plan decision-maker's *interpretation* of the plan, which leads to denial of a claim, is reasonable," and accepting as correct the district court's application of these factors in analyzing the reasonableness of the administrator's interpretation of plan language) (emphasis added).[8]

Munsen v. Wellmark, Inc., ___ F. Supp. 2d ___, 2003 WL 21212125, *12 (N.D. Iowa May 27, 2003). Thus, in this case, these factors are applicable to the "reasonableness" of Fortis's *interpretation* of such terms in the Group Long Term Disability Insurance Policy to the extent that the interpretations of such terms are in dispute. *Cf. West*, 171 F. Supp. 2d at 870 (distinguishing in that case between issues of interpretation by the administrator, to which the "five-factor test" applied, and factual determinations, to which the "substantial evidence" standard applied). However, the court cannot find that LeStrange has ever disputed Fortis's "interpretation" of any policy terms, although she has certainly disputed Fortis's factual determination that she does not satisfy the Occupation Test and thus is not disabled due to an ability to accommodate her in her current position. Such a contention is relevant to the court's determination concerning whether there is "substantial evidence" to support Fortis's decision to deny

benefits.

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[8]This court notes that the factors themselves are always cast in terms of the administrator's "interpretation," not the administrator's "determination." *See Shelton*, 285 F.3d at 642 (casting the factors in these terms); *Ferrari*, 278 F.3d at 808 n.4 (same).

B. Substantial Evidence

The court turns to the question of whether Fortis's factual determination that LeStrange was not entitled to LTD benefits was supported by "substantial evidence." *Norris*, 308 F.3d at 883-84 ("A plan administrator's fact-based disability decision is reasonable if it is supported by 'substantial evidence.'"); *Jackson*, 303 F.3d at 887. In other words, was Fortis's factual determination based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Donaho v. FMC Corp.*, 74 F.3d 894, 900-901 (8th Cir. 1996) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

1. Treating physician rule

a. Arguments of the parties

LeStrange argues that Fortis's determination—that she did not satisfy the Occupation Test because she was not prevented from performing a material duty of her regular occupation and therefore, was not disabled—was not supported by substantial evidence for a number of reasons. LeStrange points out that her treating physician relative to her amputation and subsequent related medical problems for the past ten years, Dr. Thompson, classified LeStrange as disabled, stating that LeStrange "has had difficulty attaining a satisfactory fit and consistent use of her prosthesis, [since the amputation in 1993] largely because of the interactions of her psoriasis, her work environment, and the use of her prosthesis." Def.'s App., at 0060.

As to whether or not LeStrange can perform her job duties with the accommodation of a wheelchair or stool, LeStrange argues that "she could not emotionally handle being seen without her prosthesis." Def.'s App., at 0232. Hence, when asked in the claim statement what accommodations she felt could be made by her employer to allow her to return to work, LeStrange stated, "None if unable to wear my prosthetic because of psorasis [sic]." Def.'s App., at 0255. LeStrange based her claim for LTD benefits on her inability to work full-

time which prevented her from performing a material duty of her occupation. In support of her argument, LeStrange identifies the statements of her treating physician, Dr. Thompson in his June 12, 2001, letter to Fortis after LeStrange was denied benefits, "To suggest that a reasonable accommodation for a job would include discontinuing use of a leg and mandating the use of a wheelchair goes against the rehabilitation process and expands their impairment back to a disabling and handicapping condition." Def.'s App., at 0060. LeStrange also cites a letter from therapist Ann Souder who conducted three sessions with LeStrange after Fortis denied LeStrange's request for benefits and whose opinion it was that the suggested accommodation of a wheelchair would render LeStrange "open to shattering her adapted body image and does not appear to be a reasonable accommodation." Def.'s App., at 0059. Next, LeStrange points to Dr. Fry and Dr. Snoxell's review of her medical records and other documents in the case. Specifically, LeStrange claims that Fortis's factual determination that the proposed accommodation—involving use of a wheelchair—was reasonable, was not supported by substantial evidence because Dr.'s Fry and Snoxell never physically examined, nor personally met with, LeStrange. Pl.'s Br., at 8.

In response, Fortis argues that it had before its decision-makers evidence that LeStrange could physically perform the material duties of her occupation with accommodation. This argument, of course, suggests consideration of what exactly are the material duties of LeStrange's occupation. Both parties agree that the material duties of LeStrange's occupation—Fishing-Line-Winding-Machine-Operator—as required by her employer and as required generally by employers according to the Dictionary of Occupational Titles ("D.O.T.") are the following:

> 1. Tends machine to wind fishing line onto spools;
> 2. Places spool of line on spindle;
> 3. Slides empty spools on shaft of machine;
> 4. Turns screws to hold spools in place;
> 5. Threads line through machine handle, over blade and onto empty spools;

> 6. Depresses pedal to start machine and wind line onto spools;
> 7. Moves machine handle to guide link back and forth across spool.
> 8. The Policy provides that "[o]ne *material duty* of your regular occupation is the ability to work for an employer on a *full-time* basis as defined in the *Policy*."

Joint Stipulation of Facts Regarding the Material Duties of Plaintiff's Occupation, at 1-2. The court notes that neither party found that standing was a material duty of LeStrange's occupation. Fortis asserts that its reviewing physician, Dr. Frey, considered these material duties in light of Dr. Thompson's Attending Physician Statement, dated April 11, 2001. According to Fortis, Dr. Frey relied on Dr. Thompson's APS for the conclusion that LeStrange could work in a seated position without her prosthesis and thereby was not physically limited from performing a material duty of her occupation because Pure Fishing represented to Fortis on numerous occasions that LeStrange's job could be performed from a wheelchair or a stool. Def.'s App., at 0233, 0100, 0033, 0029.

Similarly, Fortis argues that it reasonably discounted Dr. Thompson's opinion in his June 12, 2001, letter for two reasons. First, in his subsequent letter, Dr. Thompson did not state that LeStrange could not work from a seated position without her prosthesis. Secondly, Fortis claims that it did not abuse its discretion when it dismissed Dr. Thompson's subsequent opinion because there was significant contrary evidence, including Dr. Thompson's opinion in his APS that LeStrange could work with her impairment in a "Sit down job, able to do with one leg." Def.'s App., at 0249. Thus, Fortis contends that there existed substantial evidence in the Administrative Record to allow Amy Langler, vocational expert for Fortis, to conclude that LeStrange was not physically disabled from performing a material duty of her occupation.

In response to Ann Souder's opinion that work in a wheelchair without LeStrange's prosthesis was not a reasonable accommodation, Fortis argues that such an opinion does not

support or demonstrate that LeStrange was mentally disabled for two reasons. First, Ann Souder found that "Ms. LeStrange's emotional health is excellent and she has no mental health incapabilities." Def.'s App., at 0059. Secondly, Fortis alleges that Ann Souder's diagnosis of LeStrange with adjustment disorder was by definition invalid because the requisite stressor—identified by Ann Souder as the *possibility* of LeStrange's return to work in a wheelchair—had not yet occurred rendering Ann Souder's opinion a mere prediction. In addition, Fortis cites Dr. Thompson's APS as support for its conclusion that LeStrange was not mentally disabled from performing her occupation because in it, Dr. Thompson assigned LeStrange a Class 1, psychiatric impairment described as the following: "Patient is able to function under stress and engage in interpersonal relations (*no limitations*)." Def.'s App., at 0248. Again, Fortis points out that in this same APS, Dr. Thompson stated that LeStrange could work in a seated position without her prosthesis. Def.'s App., at 0248.

b. Analysis

LeStrange argues that Fortis has failed to provide substantial evidence to deny LeStrange LTD benefits because the asserted reasonableness of the accommodation of a wheelchair is based on the opinions of Dr. Fry and Dr. Snoxell, neither of whom physically examined LeStrange or treated her in the past. Pl.'s Br., at 8. According to LeStrange, Fortis should rely on the opinions of Dr. Thompson, LeStrange's treating physician of approximately ten years, and Ann Souder whose opinion was formed after meeting with and observing LeStrange on three separate occasions. Pl.'s Br., at 9. In support of her position, LeStrange directs the court's attention to the case of *Pierce v. American Waterworks Co., Inc.*, 683 F. Supp. 996 (W.D. Penn. 1988). The plaintiff in *Pierce* sought disability benefits from the Retirement Plan Committee and thereby submitted to the Committee a letter from his treating physician, as well as the social security decision of an administrative law judge with the Social Security Administration. *Id.* at 998. Despite the determination of total disability by both the plaintiff's treating physician and the administrative law judge, the

Committee denied the plaintiff disability benefits based on the opinion of the physician the defendant hired to review the plaintiff's medical records. *Id.* at 1000. The defendant's reviewing physician determined that the plaintiff was not totally and permanently disabled. *Id.* at 999. The court in *Pierce* found that the reviewing physician's report was not credible for a variety of reasons. *Id.* at 1000. First, the court found that the reviewing physician based his report solely on the treating physician's letter and the opinion of the administrative law judge, and did not review or request any other medical records of the plaintiff nor did he examine the plaintiff. *Id.* Secondly, the court determined that the reviewing physician's report was conclusory because he did not state the factual basis he relied upon to arrive at his opinion. Finally, the court found that there was absolutely no evidence within the plaintiff's treating physician's letter and the administrative law judge's opinion to support the reviewing physician's conclusion that the plaintiff was not totally and permanently disabled. *Id.* Therefore, the *Pierce* court afforded the reviewing physician's opinion "no more weight than pure speculation" and concluded that the Committee's decision to deny the plaintiff disability benefits was not supported by substantial evidence because the only evidence before the Committee that the plaintiff was not totally and permanently disabled was the reviewing physician's report. *Id.*

In light of *Pierce*, LeStrange argues that the opinions of Dr. Frey and Dr. Snoxell, like that of the non-treating physician in *Pierce*, "are deserving of little weight." Pl.'s Br., at 10. The court interprets LeStrange's argument to advocate application of what has become known as the 'treating physician rule' to the facts of this case. *Donaho v. FMC Corp.*, 74 F.3d 894, 901 (8th Cir. 1996). The origin of the treating physician rule can be traced to the Social Security Administration which accords special weight to the opinions of the claimant's treating physician(s) in determining whether the claimant is entitled to social security disability benefits. *See Black & Decker Disability Plan v. Nord*, No. 02-469, 2003 WL 21210418 (May 27, 2003) (citing 20 C.F.R. § § 404.1527(d)(2), 416.927(d)(2) (2002))

(publication page references are unavailable); *Donaho*, 74 F.3d at 901 ("We have held, in Social Security cases, that a reviewing physician's opinion is generally accorded less deference than that of a treating physician") (citing *Thompson v. Bowen*, 850 F.2d 346, 349 (8th Cir. 1988).

Most recently, the United States Supreme Court addressed the question of whether "a similar 'treating physician rule' applies to disability determinations under employee benefits plans covered by the Employee Retirement Income Security Act of 1974 (ERISA or Act), 88 Stat. 832, as amended, 29 U.S.C. § 1001 *et seq.*" *Nord*, 2003 WL 21210418. The respondent in *Nord* was formerly employed by a subsidiary of Black & Decker as a material planner. *Id.* In 1997, the respondent consulted his treating physician concerning hip and back pain. Respondent's treating physician diagnosed him with a mild degenerative disc disease. *Id.* After unsuccessful attempts at medicating his condition, the respondent submitted a claim for disability benefits under his employer's disability plan. *Id*. In addition, the respondent submitted letters and records from his treating physician, treating orthopedist, and a questionnaire form entitled Work Capacity Evaluation completed by a Black & Decker human resources representative. *Id.* Nonetheless, during the plan administrator's review process, Black & Decker referred the respondent to a neurologist for examination who consequently concurred with the respondent's treating physician's diagnosis of a degenerative disc disease and chronic pain. *Id.* However, the neurologist concluded that with pain medication, the respondent could perform sedentary work. *Id.* Thus, the plan administrator denied the respondent's claim for disability benefits. *Id.* On cross-motions for summary judgment, the federal district court granted judgment for the petitioner but was reversed on appeal to the Ninth Circuit Court of Appeals who proclaimed that ERISA plan administrators must follow the treating physician rule when making benefit determinations. *Id.* (citing *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1139-44 (9th Cir. 2001), *cert. denied*, ___ U.S. ___, 2003 WL 21251558 (June 2, 2002)). In *Regula*

v. Delta Family-Care Disability Survivorship Plan, the Ninth Circuit Court of Appeals proceeded to require a plan administrator "'who rejects [the] opinions [of a claimant's treating physician] to come forward with specific reasons for his decision, based on substantial evidence in the record.'" *Id.* (quoting *Regula*, 266 F.3d at 1139). The United States Supreme Court granted certiorari in light of the split among the federal circuit courts of appeals regarding the issue. The Supreme Court vacated the judgment of the Ninth Circuit Court of Appeals and held unanimously that:

> Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. But, we hold, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.

Id.

Applying the Court's recent opinion in *Nord* to the facts in this case, the court finds that LeStrange's reliance upon *Pierce* is misplaced. Specifically, the court cannot find that Fortis's factual determination was not supported by substantial evidence merely because Fortis declined to accord special weight to the opinions of LeStrange's treating physician Dr. Thompson; dermatologist Dr. Drage; or therapist Ann Souder. *See id.* However, the court does not believe that the inquiry ends there. LeStrange argues that Fortis's factual determination was not supported by substantial evidence because it relied on its reviewing physicians' opinions which conflicted with her treating physicians' determinations. According to *Nord*, Fortis cannot arbitrarily refuse to credit LeStrange's reliable evidence, including the opinions of LeStrange's treating physicians. Therefore, the court must analyze whether the reviewing physicians' opinions constituted reliable evidence.

In order to formulate an opinion about whether LeStrange was limited from performing

her occupation by her medical/physical diagnoses of right below the knee amputation and psoriasis, Dr. Frey reviewed all of the letters and supporting documentation submitted by LeStrange from Dr. Thompson and Dr. Drage, as well as additional documentation exemplifying the material duties and working conditions in LeStrange's occupation. In Dr. Frey's clinical services summary that he prepared for Dave Elvidge, appeals specialist with Fortis, he defers to Dr. Drage's diagnosis of LeStrange's new rash as "subacute dermatitis," with an onset date of December 2000. Dr. Frey points out that Dr. Drage did not attribute the new rash to LeStrange's psoriasis which primarily effects her scalp, elbows, knees, and back. Def.'s App., at 0093. In addition, Dr. Frey referred to the diagnostic studies conducted by Dr. Drage, including biopsies, swabs, and patch skin tests and noted that LeStrange tested positive to paraphenylenediamine, but mentioned that Dr. Drage asked LeStrange to talk with Dr. Thompson to see if the shrink stocking in her prosthetic could harbor paraphenylenediamine, sometimes seen in elastic stockings. Def.'s App., at 0092. Dr. Frey did not mention that Dr. Drage commented that LeStrange does photocopying and paraphenylenediamine is present in photocopying materials, but the court notes that photocopying is not considered a material duty of LeStrange's occupation by either party to the present case. Joint Stipulation of Facts Regarding the Material Duties of Plaintiff's Occupation, at 1-2. Similarly, Dr. Frey did not mention that Dr. Drage also stated that paraphenylenediamine is present in leather dyes and LeStrange has leather car seats which could explain her testing positive. Dr. Frey did make abundantly clear that Dr. Drage's examinations and diagnostic studies of LeStrange's rash, the samples of the fishing line she makes, and the material data sheets from her place of work demonstrated that the rash was not associated with her work and the components thereof, or the components of her prosthesis. Def.'s App., at 0093. Furthermore, Dr. Frey deferred to Dr. Drage's opinion that the rash was likely caused by a combination of heat, infection, and the mechanical irritation of LeStrange's prosthesis. Def.'s App., at 0093. The court notes that no where

in the record did Dr. Drage state that LeStrange was disabled. Finally, Dr. Frey cited Dr. Drage's examinations of LeStrange on April 9, 2001, and April 13, 2001, on which both occasions Dr. Drage notes significant improvement in LeStrange's dermatitis. Dr. Frey referred with particularity, and almost word-for-word, to Dr. Drage's April 9, 2001, examination, in which she stated that LeStrange's dermatitis on the shoulders, outer and inner arms, dorsal hands, and fingers had cleared completely, "there was significant improvement of the amputation stump," and no outright dermatitis of the stump. Def.'s App., at 0114. It was during this visit that Dr. Drage attributed LeStrange's significant improvement to her treatment with hydrocortisone and Nizoral to the stump site, as well as topical steroids to other parts of her body. Dr. Drage's opinion concerning LeStrange's treatment caused Dr. Frey, in his clinical services summary, to concur with the treatments of LeStrange's skin conditions by both Dr. Drage and Dr. Thompson and recommend continuation of this treatment regimen. Def.'s App., at 0093.

Hence, the above agreement on the part of Dr. Frey with Dr. Thompson's treatment of LeStrange's skin condition is evidence of Dr. Frey's reliance upon Dr. Thompson's opinion, as is the following:

> As per attending physician statement dated 04/11/01, the claimant has a class 4 physical impairment (moderate limitation capable of sedentary, clerical, or administrative work. Occasional 10 lbs. force, mostly sitting). Additional remarks by the attending physician, Dr. Thompson, regarding physical impairment include: 'the claimant would require the ability to work without use of her prosthesis intermittently for variable amounts of time up to weeks.' The attending physician statement also notes that a job modification in which the claimant could sit down and be able to work with one leg would enable the claimant to work.

Def.'s App., at 0093. Not only did Dr. Frey defer to Dr. Thompson's opinion throughout his summary, but he quoted Dr. Thompson at times as reflected by the above excerpt.

Notwithstanding, Dr. Frey did not report in his clinical services summary that during LeStrange's April 11, 2001, appointment with Dr. Thompson, that Dr. Thompson noted that "it would be impossible for her to work without her leg and/or needing to remove her leg on a regular basis." Def.'s App., at 0119. However, in this same report, Dr. Thompson remarked that "A form was completed regarding her work restrictions." Def.'s App., at 0120. The form—Attending Physician Statement—completed by Dr. Thompson, had the box next to "Poor" checked to describe LeStrange's prognosis for return to her current job. Def.'s App., at 0249. In spite of this, when the category entitled "Rehab," located right below the prognosis category asked "Would job modification enable patient to work with impairment?" Dr. Thompson checked the box labeled "Yes." Def.'s App., at 0249. If the physician's answer was "yes," the physician was asked to "describe" and so Dr. Thompson stated "Sit down job, able to do with one leg." Def.'s App., at 0249.

Based on Dr. Thompson's opinions leading up to and including April 11, 2001, *before* Fortis denied LeStrange's claim for LTD benefits, it would appear that Dr. Thompson concluded that LeStrange could perform sedentary work. Not only would it appear as much, but counsel for LeStrange in fact admits in her reply brief that Dr. Thompson's initial opinion in his APS, and consequently his accompanying examination of LeStrange on April 11, 2001, was that LeStrange "could work in a sitting position." Pl.'s Reply Br., at 1. Furthermore, counsel for LeStrange admits that Dr. Thompson changed his initial opinion in his subsequent letter of June 12, 2001, *after* Fortis denied LeStrange's claim for benefits. Pl.'s Reply Br., at 1-2. In the June 12, 2001, letter Dr. Thompson asserts that work with a wheelchair, and possibly in the presence of heat and chemical exposure, is not compatible with the use of LeStrange's prosthesis. Def.'s App., at 0060. However, there was no explanation for his new view, such as evidence of specific physical changes that further limited LeStrange's capacity to perform sedentary work "without her prosthesis (one legged) intermittently for variable amounts of time—up to weeks" as he had initially represented.

Def.'s App., at 0249. In fact, Dr. Thompson does not retract in his June 12, 2001, letter any of his earlier statements regarding LeStrange's ability to perform "sedentary, clerical or administrative work—occasional 10# [pound] force, mostly sitting" contained in his APS. Def.'s App., at 0249. Instead, he states that work in a wheelchair goes against the rehabilitation process, but does not comment that LeStrange is physically incapable of performing her occupation from a sedentary position because of her medical/physical diagnosis.

Considering Dr. Thompson's contradictory opinions concerning LeStrange's rehabilitation and the absence of explanatory statements on the part of Dr. Thompson in support of his change of opinion, the court finds—with regard to Dr. Thompson's opinions—that only those opinions promulgated by Dr. Thompson *before* Fortis denied LeStrange's claim are at best deserving of some credence and may be considered reliable. Under these circumstances, and considering both the quality and quantity of the evidence that Dr. Frey had before him—including Dr. Drage's opinions—the court concludes that Dr. Frey's determination that LeStrange was "capable of performing her occupation if allowed to sit in either a wheelchair or on a stool," was reliable, substantial evidence that Fortis could and did credit when it made its determination. *See Brant*, 195 F. Supp. 2d at 1108-09 (summarizing the applicable standards); *accord Norris*, 308 F.3d at 883-84; *Jackson*, 303 F.3d at 887.

Furthermore, as the claimant, LeStrange needed to demonstrate her entitlement to benefits, and she therefore had the burden of substantiating Dr. Thompson's new diagnosis that she was incapable of performing a "Sit down job, able to do with one leg." Def.'s App., at 0249. Arguably, LeStrange attempted to satisfy her burden by providing Fortis with Ann Souder's diagnosis of adjustment disorder with mixed anxiety and depressed mood.

LeStrange's submission of records from her sessions with Ann Souder prompted a review by Dr. Snoxell, an in-house doctor of psychology with Fortis. Def.'s App., at 0078.

The purpose of Dr. Snoxell's review was to "address the issue that Ms. LeStrange is concerned she will experience psychological distress if she returns to work in a wheelchair or needs to remove her prosthetic leg during the day while at work." Def.'s App., at 0078. In the course of her review, Dr. Snoxell examined the records from LeStrange's three sessions with Ann Souder, which were conducted between the dates of June 11, 2001, and July 10, 2001. Dr. Snoxell reiterated the symptoms Ann Souder identified in her initial assessment as the following: "initial and middle insomnia, heightened anxiety and decrease in appetite." Def.'s App., at 0078. Dr. Snoxell also acknowledged that LeStrange reported during these sessions that she believed the symptoms were attributable to the prospect that she would have to work in a wheelchair "which she described as degrading." Def.'s App., at 0078. Despite Ann Souder's diagnosis and LeStrange's explanation for her symptoms, Ann Souder's letter of August 15, 2001, also demonstrated:

> Ms. LeStrange identifies herself as an able bodied worker and has plans to work on healing her psoriasis and return to work utilizing her prosthesis as possible. She obviously has a long history with Pure Fishing Company and has done the best she can to stay at work and would like to plan to go back to work with her prosthesis.

Def.'s App., at 0059. Similarly, Dr. Snoxell quoted Ann Souder as stating, during her third and final session with LeStrange,

> 'She appears to really have no mental health issues other than the anxiety and the stress regarding the possibility of having to go to work in a wheelchair. It appears that if she should have to leave her prosthetic at home and go to work in a wheelchair that this will enact a very difficult loss for client, and may effect her mental health very detrimentally.'

Def.'s App., at 0078. Based on her review of this information, Dr. Snoxell analyzed LeStrange's symptoms, as identified by Ann Souder, against the diagnostic criteria for the diagnosis of adjustment disorder. Def.'s App., at 0078. According to Dr. Snoxell, the

diagnostic criteria for the diagnosis of adjustment disorder includes "'A) the development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring *within 3 months of the onset of the stressor(s)*.'" Def.'s App., at 0078 (emphasis added). The court finds that Dr. Snoxell's diagnostic criteria for the diagnosis of adjustment disorder is not inconsistent with those identified by STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000).[9] Dr. Snoxell concluded from her analysis that the diagnosis of adjustment disorder:

> is not appropriate because the only stressor reported is proposed return to work. She has not returned to work, so if work is the stressor, there has been no onset. Similarly, it is not feasible to predict the onset of a mental health condition should a certain set of events occur at some point in the future.

Def.'s App., at 0079. It would appear from Dr. Snoxell's review that she did not discredit Ann Souder's opinion, but interpreted Ann Souder's subjective findings differently when analyzed against diagnostic criteria relied upon by doctors in the field. The instant case is distinguishable from the facts of the *Pierce* case, which LeStrange asserts is controlling, because Dr. Snoxell: (1) did not rely on a single letter from LeStrange's therapist; (2) stated the factual basis she relied upon to arrive at her opinion; and (3) the medical records are not devoid of evidence to support her conclusion that LeStrange does not meet the criteria for any mental health diagnosis. *See Pierce*, 683 F. Supp. at 1000. The court concludes that Dr. Snoxell's review amounted to reliable and substantial evidence which could serve as a reasoned explanation for Fortis's decision to deny benefits. *See Brant v. Principal Life & Disability Ins. Co.*, 195 F. Supp. 2d 1100, 1108-09 (N.D. Iowa 2002) (quoting *Marshall*, 258

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[9] STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000), defines "adjustment disorder" as "(1) a group of mental and behavioral d.'s in which the development of symptoms is related to the presence of some environmental stressor or life event and is expected to remit when the stress ceases; (2) a d. whose essential feature is a maladaptive reaction to an identifiable psychological stress, or stressors, that occurs *within weeks of the onset of the stressors* and persists for up to six months."

F.3d at 841 (citing *Donaho v. FMC Corp.*, 74 F.3d 894, 899 (8th Cir. 1996)), *aff'd*, 50 Fed. Appx. 330, 2002 WL 31477623 (8th Cir. Nov. 7, 2002) (unpublished op.); *West v. Aetna Life Ins. Co.*, 171 F. Supp. 2d 856, 866-67 (N.D. Iowa 2001).

With regard to this portion of LeStrange's complaint, the court concludes that Fortis's conclusion that LeStrange was not disabled under the plan was not unreasonable under these facts.

2. Conflict of interest

a. Arguments of the parties

LeStrange argues that doctors Fry and Snoxell are not independent and detached from the decision-making process because they were both retained and employed by Fortis. Pl.'s Reply Br., at 2. In response, Fortis asserts that LeStrange states her accusation "without supporting facts or authority" and such an accusation "is clearly not supported by facts or law." Def.'s Br., at 26 n.11.

b. Analysis

It is unclear whether LeStrange's contention that there was a conflict of interest, is presented in an effort to obtain a less deferential standard of review, which is generally what a claimant is entitled to if the claimant successfully satisfies a two-step process: The court must first decide whether the claimant has presented "'material, probative evidence demonstrating that . . . a palpable conflict of interest or a serious procedural irregularity existed,'" then determine whether that conflict or irregularity "'caused a serious breach of the plan administrator's fiduciary duty to her.'" *Heaser v. Toro Company*, 247 F.3d 826, 833 (8th Cir. 2001) (quoting *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160 (8th Cir. 1998)).

The plaintiff in *Lawyer v. Hartford Life & Accident Insurance Company*, 100 F. Supp. 2d 1001, 1010 (W.D. Mo. 2000), like LeStrange, argued that the defendant breached its fiduciary duty to her when it did not obtain an independent medical evaluation, but relied instead upon its in-house physician to review her claim. The court in *Lawyer* proceeded to

distinguish the facts of the case from those in *Woo*, finding that the plaintiff's "case does not present the same type of extenuating circumstances that existed in *Woo*." *Id.* Those extenuating circumstances that necessitated the independent medical evaluation in *Woo* included medical evidence that the claimant was afflicted with an uncommon disease and opinions from the claimant's two treating physicians that she had been disabled from her job before she resigned. *Id.* (citing *Woo*, 144 F.3d at 1161).

This court too finds that this case does not present the same type of extenuating circumstances that existed in *Woo*. *See id*. The court points out that LeStrange had meaningful opportunities to present additional information for review because of her subsequent appeals, and did so, supplementing the record with Dr. Thompson's letter of June 12, 2001, Ann Souder's records, and other additional documentation. Moreover, even if LeStrange could successfully establish either a palpable conflict of interest or serious procedural irregularity, the Eighth Circuit Court of Appeals has stated that "The evidence offered by the claimant must give rise to serious doubts as to whether the result reached was the product of an arbitrary decision or the plan administrator's whim. *Id.* It is not enough simply to show the plan administrator did not act in the sole interest of the claimant." *Tillery v. Hoffman Enclosures, Inc.*, 280 F.3d 1192, 1197 (8th Cir. 2002) (citing *Schatz v. Mutual of Omaha Ins. Co.*, 220 F.3d 944, 946-47 (8th Cir. 2000)).

On account of LeStrange's failure to meet the two-part test established in *Woo*, the court concludes that Fortis did not abuse its discretion when it did not obtain an independent medical evaluation of LeStrange.[10]

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[10]LeStrange points to the administrative law judge's decision regarding the approval of social security benefits as further indication of her disabled status. Pl.'s Br., at 7. However, as the Eighth Circuit Court of Appeals explained in *Jackson v. Metropolitan Life Ins. Co.*, 303 F.3d 884, 889 (8th Cir. 2002),

> an ERISA plan administrator or fiduciary generally is not bound

(continued…)

III. CONCLUSION

The court finds that the extent to which LeStrange's condition impairs her ability to perform her occupation is something about which reasonable minds could disagree. Although our judgment might have differed from Fortis's were we deciding on a clean slate, on the record before us we are constrained to deny LeStrange's Petition to Overturn Agency's Decision and affirm Fortis's denial of LTD benefits to LeStrange under Pure Fishing's Group Long-Term Disability Benefits Policy.

IT IS SO ORDERED.

DATED this 13th day of June, 2003.

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[10](…continued)

> by a SSA determination that a plan participant is "disabled." *See Schatz v. Mut. of Omaha Ins. Co.*, 220 F.3d 944, 950 n.9 (8th Cir. 2000); *Anderson v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local No. 12 Pension & Welfare Plans*, 991 F.2d 356, 358-59 (7th Cir. 1993); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1286 (9th Cir. 1990), *cert. denied*, 498 U.S. 1087, 111 S. Ct. 964, 112 L. Ed. 2d 1051 (1991).

The *Jackson* court mentioned that the Plan's definition of disabled was similar, but not identical to the definition of disabled that the SSA applied. *Id.* As Fortis points out in its brief, LeStrange did not submit to Fortis the administrative law judge's opinion, but merely the SSA award letter, preventing Fortis from examining the findings of the SSA or the evidence the administrative law judge relied on to determine that LeStrange was disabled. Def.'s Resistance, at 25 n.10. Even when confronted with similar definitions of disability, the Eighth Circuit Court of Appeals has held that the SSA's determination does not require the ERISA plan administrator to reach the same conclusion. *See Coker v. Metropolitan Life Ins. Co.*, 281 F.3d 793, 798 (8th Cir. 2002). Therefore, the court finds that Fortis was not required to reach the same conclusion as the SSA.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA